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FIRST GENERAL COUNSEL'S REPORT

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DATE COMPLAINT FILED: March 28, 2012

DATE OF NOTIFICATION: April 2, 2012

DATE ACTIVATED: July 24, 2012

EXPIRATION OF SOL: October 11, 2016

COMPLAINANT:

Mark Miller

RESPONDENTS:

Fred Kundrata for Congress Committee and
William Bristol, in his official capacity as
treasurer

Fredrick L. Kundrata, III

Robert L. Saur, as assistant treasurer of the Fred
Kundrata for Congress Committee

RELEVANT STATUTES
AND REGULATIONS:

2 U.S.C. § 431(2)

2 U.S.C. § 432(e)

2 U.S.C. § 433(a)

2 U.S.C. § 434(a)

2 U.S.C. § 434(b)

11 C.F.R. § 100.72

11 C.F.R. § 100.131

11 C.F.R. § 101.1

11 C.F.R. § 104.3

11 C.F.R. § 104.5(a)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint alleges that Fredrick L. Kundrata, III, the Fred Kundrata for Congress Committee and William Bristol in his official capacity as treasurer ("Kundrata Committee" or "Committee"), and Robert L. Saur as the Kundrata Committee's assistant treasurer violated the Federal Election Campaign Act of 1971, as amended, (the "Act") by failing to file disclosure

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1 reports and by filing incorrect reports with the Commission. Upon review of the Complaint,
2 Response, and other available information, it appears that any potential violations of the Act
3 were minor and do not warrant further use of Commission resources. Therefore, we recommend
4 that the Commission dismiss the allegations with letters of caution to the Respondents.

5 II. FACTUAL AND LEGAL ANALYSIS

6 Kundrata was a candidate in the March 6, 2012, Republican primary election for U.S.
7 House of Representatives in Ohio's Second Congressional District.¹ Kundrata filed a Statement
8 of Candidacy with the Commission on November 15, 2011, designating the Committee as his
9 principal campaign committee. On the same date, the Kundrata Committee filed its Statement of
10 Organization. The Complaint alleges that the Respondents committed five reporting violations
11 of the Act and Commission regulations. Compl. at 2.

12 A. Failure to File 2012 Pre-Primary Report

13 First, the Complaint alleges that the Respondents failed to file a Pre-Primary Report
14 before the March 6, 2012, Republican primary election. *Id.* at 2-3. The Response filed on behalf
15 of all Respondents explains that the Committee did not timely file its Pre-Primary Report
16 because of Bristol's mistaken belief that the report was not required when donations received
17 were under a certain threshold.² Resp. at 2. The Response states that the Committee filed its
18 Pre-Primary Report on April 11, 2012. *Id.*

19 The Act requires that the principal campaign committee of a House candidate file a
20 disclosure report no later than the 12th day before any election in which the candidate is seeking

¹ Kundrata lost the primary election with approximately 3.44% of the vote. See <http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2012Results/20120306repUSrep.aspx>.

² The Response notes that Kundrata was a first-time candidate and that his campaign was "a first attempt for all involved." Resp. at 5.

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election. 2 U.S.C. § 434(a)(2); 11 C.F.R. § 104.5(a)(2)(i). The Kundra Committee failed to file its Pre-Primary Report until 36 days after the Republican primary election.

The Pre-Primary Report filed on April 11, 2012, disclosed \$820 in contributions received, \$10,332.87 in operating expenditures, \$9,000 in debts and obligations owed by the Committee, and a negative \$262.87 cash-on-hand balance. Given the limited amount of financial activity disclosed on the report we recommend that the Commission dismiss as a matter of prosecutorial discretion the allegation that Respondents violated 2 U.S.C. § 434(a) with a letter of caution. *See Heckler v. Chinnay*, 470 U.S. 821 (1985).

B. Failure to Identify Source of Loans

Second, the Complaint alleges that the Respondents failed to correctly identify the source of two loans reported in the Committee's Year-End Report, filed January 30, 2012. Compl. at 3. The Complaint asserts that the source of two loans — a \$500 loan dated November 4, 2011, and a \$12,246.08 loan dated December 1, 2011 — was incorrectly identified as "Fred Kundra for Congress Committee," which was the borrower, not the lender. *Id.* The Response contends that the loans were correctly classified as loans from candidate Kundra on the Year-End Report, but that the wrong entity box was inadvertently checked on the electronic form due to inexperience with FECfile. Resp. at 2.

The Act and Commission regulations require political committees to disclose all loans, including loans from a candidate to his or her authorized committee. 2 U.S.C. § 434(b)(2)(G)-(H); 11 C.F.R. § 104.3(a)(3)(vii). The Kundra Committee's Year-End Report disclosed the source of two loans as "Fred Kundra for Congress Committee." Both of these loans, however,

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1 were also classified as loans of "personal funds" on Schedule C and as loans made by the
2 candidate on the report's summary page.

3 In light of the minor violation and the fact that the loans were correctly identified as loans
4 from the candidate's "personal funds," we recommend that that the Commission dismiss as a
5 matter of prosecutorial discretion the allegation that Respondents violated 2 U.S.C. § 434(b) with
6 a letter of caution. *See Heckler*, 470 U.S. at 821.

7 **C. Failure to Report Contributions or Debt**

8 Third, the Complaint alleges that the Respondents failed to report contributions or debt.
9 The Complaint notes that the Committee's first reported receipt was the \$500 loan dated
10 November 4, 2011, and that the Committee's first reported disbursements pre-date that receipt.
11 Compl. at 3. The Committee's Year-End Report discloses two disbursements of \$4,605 each to
12 Pixels and Dots for "web design" on October 11, 2011. *Id.* The Complaint argues that the
13 Committee must have received unreported contributions — or, alternatively, did not report
14 debt — in order to make the payment to Pixels and Dots. *Id.* at 4. The Response states that at
15 the time Kundrata approached the web design firm to begin website design and hosting, he did
16 not know whether he would run for office.⁴ Resp. at 2-3. The Response denies that the
17 Committee received any unreported contributions. *Id.* at 3.

18 The Act and Commission regulations require political committees to disclose all receipts
19 and disbursements. 2 U.S.C. §§ 434(b)(2), 434(b)(4); 11 C.F.R. §§ 104.3(a)-(b). Political
20 committees are also required to report the amount and nature of outstanding debts and
21 obligations. 2 U.S.C. § 434(b)(8); 11 C.F.R. § 104.3(d). Although the Complaint correctly notes
22 that the Committee disclosed \$9,210 in disbursements to Pixels and Dots before receiving

⁴ Although the Response raises the timing of Kundrata's candidacy in connection with this allegation, that timing is addressed in part II(E), below.

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1 sufficient contributions and loans, the Committee's Year-End Report, covering the time period of
2 October 1, 2011, through December 31, 2011, also discloses \$100 in contributions received and
3 \$12,746.08 in loans from the candidate. These loans of personal funds were likely the source of
4 the funds for the Pixels and Dots expenditures.

5 In light of the fact that the Committee disclosed sufficient receipts to fund these
6 expenditures within a single reporting period, we recommend that the Commission dismiss as a
7 matter of prosecutorial discretion the allegation Respondents violated 2 U.S.C. § 434(b) with a
8 letter of caution. *See Heckler*, 470 U.S. at 821.

9 **D. Failure to Report Expenditure for Vehicle Advertising**

10 Fourth, the Complaint alleges that the Respondents did not report an expenditure for
11 wrapping a vehicle in advertising. Compl. at 4. The Complaint cites a tweet posted on
12 Kundrata's Twitter page on February 6, 2012, which included a picture of a vehicle with
13 Kundrata campaign advertising. Compl., Ex. 1. The Response asserts that the Committee
14 reported the February 14, 2012, expenditure in its Pre-Primary Report filed on April 11, 2012.
15 Resp. at 3.

16 The Act and Commission regulations require authorized committees to disclose all
17 disbursements. 2 U.S.C. § 434(b)(4); 11 C.F.R. § 104.3(b). The Pre-Primary Report discloses
18 two disbursements of \$548.48 and \$734.38 to Decal Impressions on February 14, 2012, for
19 "signs," one or both of which could be related to the vehicle advertising. Accordingly, it appears
20 that the Kundrata Committee reported the disbursement for the vehicle advertising, albeit
21 untimely.

22 Considering the small amount in violation and the fact that we are recommending that the
23 Commission decline to pursue the allegation regarding the failure to timely file the Pre-Primary

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Report, we recommend that the Commission also dismiss as a matter of prosecutorial the allegation that Respondents violated 2 U.S.C. § 434(b) with a letter of caution. *See Heckler*, 470 U.S. at 821.

E. Failure to Timely File a Statement of Candidacy

Finally, the Complaint alleges that Kundra did not timely file his Statement of Candidacy within 15 days of accepting \$5,000 in contributions or making \$5,000 in expenditures. Compl. at 5. The Complaint notes that the Kundra Committee made disbursements totaling \$9,210 on October 11, 2011, and yet Kundra did not file his Statement of Candidacy until November 15, 2011. *Id.* The Response reiterates that Kundra was not sure whether he would run for office at the time he made these disbursements. Resp. at 3-4. The Response asserts that Kundra was not, however, "testing the waters." *Id.* Additionally, the Response notes that, at the time of these disbursements, the Ohio Congressional districts had not yet been determined through redistricting and Kundra was uncertain in which district he might be a candidate. *Id.* The Response asserts that Kundra filed as soon as was practicable and within 15 days of becoming a candidate. *Id.* at 4.

An individual is deemed to be a "candidate" for purposes of the Act if he or she receives contributions or makes expenditures in excess of \$5,000. 2 U.S.C. § 431(2). Once an individual meets the \$5,000 threshold, he or she has 15 days to designate a principal campaign committee by filing a Statement of Candidacy with the Commission. 2 U.S.C. § 432(e)(1); 11 C.F.R. § 101.1(a). The Commission has established limited exemptions from these thresholds, which permit an individual to test the feasibility of a campaign for federal office without becoming a candidate under the Act. Commonly referred to as the "testing the waters" exemptions, 11 C.F.R. §§ 100.72 and 100.131 respectively exclude from the definitions of "contribution" and

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1 "expenditure" those funds received and payments made solely to determine whether an
2 individual should become a candidate. 11 C.F.R. §§ 100.72, 100.131. "Testing the waters"
3 activities include, but are not limited to, payments for polling, telephone calls, and travel.⁵
4 11 C.F.R. §§ 100.72(a), 100.131(a). An individual who is "testing the waters" need not register
5 or file disclosure reports with the Commission unless and until the individual subsequently
6 decides to run for federal office or conducts activities that indicate he or she has decided to
7 become a candidate. *See id.*; Advisory Op. 1979-26 (Grassiey).

8 Although the Response asserts that Kundra was not "testing the waters," it states that
9 when Kundra approached the web design firm Pixels and Dots, he was "unsure of whether or
10 not he was going to run for office," in part because of the ongoing Ohio redistricting efforts.
11 Resp. at 4. This claim seems to fall within the "testing the waters" exemption — that an
12 individual is able to make payments for activities before "decid[ing] to become a candidate for
13 particular office" — especially where Kundra could not have known which "particular office"
14 he would run for before Ohio set its Congressional districts. *See* 11 C.F.R. § 100.131;
15 Resp., Ex. 1.

16 From information on Kundra's campaign website, it appears that Kundra announced
17 his candidacy for office on November 15, 2011, the same date he filed his Statement of
18 Candidacy with the Commission. *See* www.fredkundra.com. The earliest evidence of activity

⁵ Certain activities may indicate that the individual has decided to become a candidate and is no longer "testing the waters." Commission regulations set out a non-exhaustive list of activities that indicate that an individual has decided to become a candidate: whether the potential candidate is (1) using general public political advertising to publicize his or her intention to campaign for federal office; (2) raising funds in excess of what could reasonably be expected to be used for exploratory activities or undertaking activity designed to amass campaign funds that would be spent after he or she becomes a candidate; (3) making or authorizing written or oral statements that refer to him or her as a candidate for a particular office; (4) conducting activities in close proximity to the election or over a protracted period of time; or (5) taking action to qualify for the ballot under state law. 11 C.F.R. §§ 100.72(b), 100.131(b). These regulations seek to draw a distinction between activities directed to an evaluation of the feasibility of one's candidacy and conduct signifying that a decision to become a candidate has been made. *See* Advisory Op. 1981-32 (Askew).

1 on the website is a post regarding Veterans Day on November 11, 2011. *Id.* The Committee's
2 Facebook and Twitter accounts do not show any activity before November 14, 2011, and
3 November 15, 2011, respectively. See www.facebook.com/FredKundraForCongress;
4 www.twitter.com/FredKundra. These dates are well within the 15-day window permitted to
5 file a Statement of Candidacy after deciding to become a candidate. The Complaint does not
6 allege, nor did we find any available information, that Kundra conducted any other activities
7 showing that Kundra decided to become a candidate before this time.

8 It appears that, under 11 C.F.R. § 100.131(a), the disbursements to Pixels and Dots on
9 October 11, 2011, may have been exempt from being reported as "expenditures" until Kundra
10 was a "candidate." In light of the fact that Kundra and the Kundra Committee do not appear
11 to have made any other expenditures, received any contributions, or conducted any other
12 activities before the disbursements to Pixels and Dots, and Kundra's Statement of Candidacy
13 was filed within 35 days of that disbursement, we do not believe that this allegation warrants
14 further Commission investigation. Accordingly, we recommend that the Commission dismiss as
15 a matter of prosecutorial discretion the allegations that Kundra violated 2 U.S.C. § 432(e) and
16 Respondents violated 2 U.S.C. § 433(a) with letters of caution. See *Heckler*, 470 U.S. at 821.

17 III. RECOMMENDATIONS

- 18 1. Dismiss the allegation that the Fred Kundra for Congress Committee and William
19 Bristol, in his official capacity as treasurer, Frederick L. Kundra, III, and Robert L.
20 Saur, as assistant treasurer of the Fred Kundra for Congress Committee, violated
21 2 U.S.C. § 434(a) and issue a letter of caution;
22
- 23 2. Dismiss the allegation that the Fred Kundra for Congress Committee and William
24 Bristol, in his official capacity as treasurer, Frederick L. Kundra, III, and Robert L.
25 Saur, as assistant treasurer of the Fred Kundra for Congress Committee, violated
26 2 U.S.C. § 434(b) and issue a letter of caution;
27
- 28 3. Dismiss the allegation that Frederick L. Kundra, III, violated 2 U.S.C. § 432(e) and
29 issue a letter of caution;

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4. Dismiss the allegation that the Fred Kundra for Congress Committee and William Bristol, in his official capacity as treasurer, Frederick L. Kundra, III, and Robert L. Saur, as assistant treasurer of the Fred Kundra for Congress Committee, violated 2 U.S.C. § 433(a) and issue a letter of caution;
5. Approve the attached Factual and Legal Analysis;
6. Approve the appropriate letters; and
7. Close the file.

Anthony Herman
General Counsel

Date

11/20/2012

Daniel A. Petalas
Associate General Counsel
for Enforcement

Kasey S. Morgenheim
Kasey S. Morgenheim
Attorney

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